IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1166

STATE OF MINNESOTA, ET AL.,
Petitioners,

and

LOUIS QUAST, ET AL.,
Intervenors,
Petitioners,

and

JAMES P. LARKIN, ET AL.,
Intervenors,
Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION, ET AL.,
Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI BY THE STATE OF MINNESOTA, ET AL.

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IN THE

Supreme Court of the United States

October Term, 1974

No. ———

STATE OF MINNESOTA,
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,
GEROME T. CAULFIELD, Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,
VAL BJORNSON, Treasurer, State of Minnesota,
ROLLAND F. HATFIELD, Auditor, State of Minnesota,
HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,
RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON, MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,
SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULRICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,

MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents,

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;

SCHOOL ADMINISTRATORS OF MINNESOTA;

MINNESOTA EDUCATION ASSOCIATION;

MINNESOTA FEDERATION OF TEACHERS;

MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litam;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD BOLSTAD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MRS. ARVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
WAYNE VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioners State of Minnesota, et al., pray that this Court issue its Writ of Certiorari to the Supreme Court of the State of Minnesota to review the judgment of that Court in File No. 43978, dated December 27, 1974.

OPINIONS BELOW

The opinion of the District Court, Second Judicial District (Ramsey County, Minnesota) by Judge J. Jerome Plunkett is not reported but appears in the Appendix hereto, separately printed, beginning at page 71.

The opinion of the Supreme Court of the State of Minnesota by Justice Todd and the concurring opinion by Justice Yetka, are reported in —— Minn. ——, 224 N.W.2d 344 and are reproduced in the Appendix hereto, beginning at page 107.

JURISDICTION

The decision of the Minnesota Supreme Court was filed on November 26, 1974. Petitions for Rehearing were then timely filed but were denied on December 27, 1974. Judgment was also entered on December 27, 1974, which judgment is here sought to be reviewed.

This Court has jurisdiction to review pursuant to 28 U.S.C. § 1257 (3).

ISSUE

Did the Minnesota Supreme Court err in interpreting *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973), as foreclosing all indirect and remote assistance to parents of nonpublic school children through the vehicle of an income tax credit, where the lower court, after an eight-day trial, determined that the statute did not have the principal or primary effect of either advancing or inhibiting religion?

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The clause was made applicable to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940).

The Minnesota Statutes involved, Minn. Stat. §§ 290.086 and 290.087 are set forth in the Appendix beginning at page 134.

STATEMENT OF THE CASE

A. The State Statute.

In 1971, the Minnesota Legislature enacted Chapter 944 (now codified as Minn. Stat. § 290.086 and § 290.087), which provides for an income tax credit on the individual income tax returns of parents or legal guardians of children in kindergarten, elementary and secondary nonpublic schools located in Minnesota. (A. 134-140)

The tax credit is based on 10 months of each calendar year during which a child is enrolled in a nonpublic school. (A. 138) Nonpublic school is defined as "any elementary or secondary school, other than a public school, situated in this state, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, is not operated for profit, and adheres to the provisions of the Civil Rights Act of 1964." Minn. Stat. § 290.086, Subd. 3. (A. 134)

For calendar year 1973 and later, the amount of the credit is the *lesser* of:

1. Amount Paid Limitation—the amount paid by parents for costs of education; or

2. Dollar Amount Limitation—the average public school state foundation aid per pupil unit, divided by the same figure for the prior year, then multiplied by $50.00 for a kindergarten student, $100.00 for an elementary school student and $140.00 for a secondary school student; or

3. Actual Expense Limitation—the restricted maintenance cost per pupil unit in average daily attendance multiplied by the average percentage of state foundation aid to public schools. Minn. Stat. § 290.086, Subd. 5. (A. 135-136)

In summary, the amount of the credit is always the *lesser* of the education costs actually paid by the parents, an adjusted dollar limitation, or the "restricted maintenance cost" per pupil unit multiplied by the state foundation aid percentage.

The Legislature was aware that no part of the parental tax credit could be allocated to the sectarian aspects of education provided in some of the nonpublic schools. The statute thus contains a number of precise limitations which assure both the theoretical and practical severability of secular and sectarian education. Those limitations are:

1. The credit is available only to those parents who satisfy the state's compulsory attendance law. The parent may satisfy the law by sending his child to a nonpublic school taught by teachers whose qualifications are essentially equivalent to public school teachers and where essentially equivalent secular subjects are taught. Minn. Stat. § 120.10, Subd. 2.

Thus even in religiously-affiliated schools, the basic secular subjects must be taught by teachers whose qualifications are essentially equivalent to the public school teachers.

2. In determining the parental costs of education to arrive at the "Amount Paid Limitation", the purchase of religious

textbooks is *excluded*. Only the purchase of those textbooks for "those subjects legally and commonly taught in public elementary and secondary schools in this state . . ." may be included within parental costs. Minn. Stat. § 290.086, Subd. 2. (A. 134)

3. In determining the amount of the credit, the most significant limitation is that contained in the "restricted maintenance cost" formula.

The nonpublic schools must determine their yearly "maintenance costs" which are basically their costs of operation, such as salaries and fixed expenses. These costs are determined in exactly the same manner as the public schools. Minn. Stat. § 290.086, Subd. 1. (A. 134) After determining this gross figure, the nonpublic schools *subtract* income from various sources (federal programs, transportation, sale of lunches, etc.) to arrive at an "adjusted maintenance cost" figure that is likewise equivalent to the public school system.

The adjusted figure is then *reduced* by 20 percent to arrive at the "restricted maintenance cost" for the nonpublic school. Minn. Stat. § 290.086, Subd. 1. (A. 134) The trial court found that this formula embodies the legislative determination that at least 80 percent of the costs of education in nonpublic schools can be attributed to secular aspects of education, while no more than 20 percent can be attributed to sectarian costs of education. (Findings of Fact 41 and 42, A. 77)

This limitation is crucial to the act because in no event can the parental credit exceed 80 percent of the actual current cost in each nonpublic school of educating a child. The restricted maintenance cost is then mutliplied by the state foundation aid percentage, which is the average percentage in state assistance paid to the *public* schools for the school year in which the credit is claimed. Minn. Stat. § 124.212. The purpose of this

last computation is to make the benefit which the nonpublic school parent receives under this act *proportional* to the benefit given to parents (and taxpayers) from state aid policies whereby the state pays part of the maintenance cost of the public schools. (Finding of Fact 29, A. 76)

When these statutory limitations are considered together, and then the formula is applied whereby the parent claims the *lesser* of the Amount Paid Limitation, the Dollar Amount Limitation or the Actual Expense Limitation, the end result is a tax credit both statistically *and* factually supportable as pertaining only to secular education.

B. The Challenges.

The statute was first challenged by the Minnesota Civil Liberties Union, Americans United for the Separation of Church and State, together with individual taxpayers, (A. 1-23), and later by the Minnesota Coordinating Committee for Public Education, together with various public school associations and individual taxpayers. (A. 23-46)

The plaintiffs asserted invalidity of the statute premised on the First Amendment to the United States Constitution and various provisions of the Minnesota Constitution. After appropriate motions, Answers were submitted by the State of Minnesota (A. 47-53) and the two groups of Intervenor Defendants (A. 53-65 and 65-70). The two actions were then consolidated for trial on the merits.

The eight-day trial centered on three basic theories asserted by plaintiffs:

1. that a typical "profile" of a Minnesota nonpublic school could only lead to the conclusion that sectarian teachings so permeated secular teachings that the two were inseparable, thus factually undermining the separation of secular and sectarian embodied in the statute; and

2. that the statute caused divisiveness in the community along denominational lines; and

3. that the statute has generated "entangling relationships" between the state and various church groups and denominational schools.

By one or more of these assertions, plaintiffs hoped to invalidate the act under the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, reh. den. 404 U.S. 876 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, [88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060, 1065] (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, . . . 403 U.S. at 612, 613.

C. The Decisions Below.

1. The Trial Court.

The trial court held that the statute did *not* violate the First Amendment nor any provision of the Minnesota Constitution and entered negative findings on the three core factual assertions raised by the plaintiffs.

a. Regarding the "permeation" theory, the Court found that the plaintiffs failed to prove any inclination of religious beliefs into the teachings of secular subjects in nonpublic schools; that they failed to show by cost analysis or *by any measurement* that the 80 percent-20 percent relationship between secular and sectarian education in any nonpublic school was incorrect; and hence that the "restricted maintenance cost" formula of 80 percent-20 percent was reasonable both

on its face *and* as applied. (Findings of Fact 53-56, 84, 87, A. 79, 82) [1]

b. Regarding the divisiveness theory, the Court found that the statute did not cause disharmony along religious lines, and in fact that persons and groups of all faiths both supported and opposed the bill; there was vigorous support and opposition to the bill, but not along denominational lines. (Findings of Fact 89-91, 94-97, A. 83) In addition, the Court found that the self-adjusting portions of the act would preclude any proponents from returning to the Legislature for larger benefits. (Finding of Fact 99, A. 84)

c. Regarding the entangling relationship theory, the Court found that the act created no new or different church-state relationships than other taxing statutes, (Findings of Fact 102-103, A. 84), and hence that no impermissible relationship was created. Central to this conclusion also was that the state's surveillance powers would only consist of examining the cost, receipt, or maintenance figures to verify the deductions claimed by the taxpayers and there would be no surveillance as to what was secular and what was sectarian in the classroom itself. (Findings of Fact 108-111, A. 85)

Based upon these and other factual conclusions, the trial court held that the statute satisfied the tripartite test set forth in *Lemon v. Kurtzman, supra,* and *Tilton v. Richardson,* 403 U.S. 672, 91 S. Ct. 2091 (1971). The secular purpose test was satisfied in that an examination of the statute showed the purpose to be secular, namely, to provide partial tax relief to

[1] Relating to the "permeation" theory, the Court noted a failure by plaintiffs to introduce *any* evidence on nonpublic schools affiliated with religions other than Roman Catholic (Finding of Fact 118, A. 86), and noted further that there were 25 nonpublic schools in the state that had no religious affiliation whatsoever. (Finding of Fact 119, A. 87)

parents of nonpublic school children who, at their own expense, were providing a secular education and thus relieving the state of its obligation to educate all children. (Finding of Fact 7, A. 72)

The Court also held that the primary effect of the statute was secular rather than sectarian, noting the failure of plaintiffs to prove the "permeation theory" and noting further that in *Lemon v. Kurtzman, supra,* the United States Supreme Court did *not* invalidate the Pennsylvania and Rhode Island statutes on the "primary effects" aspect of the test, even though the financial assistance went directly to the nonpublic schools.

Lastly, the Court held, based on the facts, that the statute neither created nor fostered any excessive entanglement between church and state. (Finding of Fact 113, A. 86)

2. The Decision of the Minnesota Supreme Court.

The trial court's decision was rendered on July 6, 1972. Numerous delays occurred in perfecting the appeal before the Minnesota Supreme Court, securing a transcript and preparing briefs. The case was finally argued before the Minnesota Supreme Court on April 1, 1974[2] and a decision filed on November 26, 1974, cited as *Minnesota Civil Liberties Union, v. State of Minnesota,* —— Minn. ——, 224 N.W. 2d 344 (1974).

In the interim between the trial court's decision and the argument before the Minnesota Supreme Court, the United States Supreme Court decided four related opinions: *Committee for Public Education v. Nyquist, supra; Sloan v.*

[2] The Court consisted of seven justices, five regular members and two retired members. The remaining four regular members of the Court, including Chief Justice Robert Sheran, abstained from participation.

Lemon, 413 U.S. 825, 93 S. Ct. 2982; *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 93 S. Ct. 2814; and *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868. These cases were all filed on June 25, 1973.

In its opinion of November 26, 1974, the Minnesota Supreme Court placed this case in a most unique posture: the Court in effect *affirmed* the conclusions of the trial court based on the law applicable at the time of the lower court decision but *reversed* the decision of the trial court on the theory that *Committee for Public Education v. Nyquist, supra*, and its companion cases changed the standards to be applied in church-state First Amendment cases.

The Court interpreted *Nyquist* as holding that there no longer existed a "primary effects" test. (A. 126) If *any* effect of a statute, no matter how remote or indirect, was to aid or assist sectarian institutions, the statute would be invalid under the Establishment Clause. As an integral part of this reasoning, the Court further concluded that the abandonment of the "primary effects" test for an "any effects" test heralded a clear preference for the Establishment Clause over the Freedom of Exercise Clause of the First Amendment. (A. 127)

The Court found it unnecessary to even discuss the "secular purpose" or "entanglement" aspects of the test due to the dispositive nature of its interpretation of *Nyquist* as establishing an "any effects" test. (A. 127)

And in applying what it concluded were the new standards in church-state cases, the Minnesota Supreme Court relied *exclusively* upon the First Amendment; no provision of the Minnesota Constitution was used as a touchstone for its decision. (A. 127)

REASONS FOR GRANTING THE WRIT

The Writ should issue for the following substantial reasons.

A. THE MINNESOTA SUPREME COURT HAS DECIDED FEDERAL QUESTIONS OF SUBSTANCE NOT IN ACCORD WITH PREVIOUS DECISIONS OF THIS COURT.

1. The Establishment Clause.

The Minnesota Supreme Court left no doubt in anyone's mind that *Nyquist* and its companion cases constituted a dramatic change in the standard governing First Amendment cases:

> The trial court found that the statute had a valid secular purpose. We are in accord with that holding. The trial court also found that the statute survived entanglement challenges. A great deal of the trial court's lengthy and learned memorandum dealt with the disposition of the entanglement question. Finally, the trial court found that the primary effect of the statute was not to promote the establishment of religion. *Absent subsequent decision of the Supreme Court, such a finding was fully justified* under the standards established by the Supreme Court in Tilton v. Richardson, *supra.*
>
> *However, during the pendency of this appeal, a series of decisions was announced by the Supreme Court of the United States which effectively changed the course and standard of measurement of establishment questions.*
>
> —— Minn. at ——; 224 N.W. 2d at 349, 350; A. 118-119. (Emphasis supplied.)

After discussion of the June, 1973 cases, the Minnesota Supreme Court articulated *how* the standard was changed:

> In applying the "primary effects test," we must be guided by the realization, as indicated above, that this is no longer a primary effects test, but an "any effects" test. Under such a standard, the legislation in question cannot pass constitutional muster.
>
> —— Minn. at ——; 224 N.W. 2d at 353; A. 126.

The obvious conclusion reached by the Court was that *any* indirect or remote assistance to a church or sectarian institution will render a statute invalid.

Petitioners do not reach such a conclusion from *Nyquist;* on the contrary, the majority opinion clearly analyzed the New York statutes in light of the "primary effects" test. The Court not only recited the standard expression of the test (413 U.S. 773, 93 S. Ct. 2965), but in discussing prior decisions, stated:

> These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian.
>
> * * *
>
> *But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.*
>
> 413 U.S. at 775; 93 S. Ct. at 2967. (Emphasis supplied.)

By treading this narrow path, the majority in *Nyquist* left intact the prior decisions of the Court where obviously some form of indirect assistance could flow to the religious school or institution. Thus *Nyquist* did not undermine such precedents as *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504 (1947); *Board of Education v. Allen,* 392 U.S. 236, 88 S. Ct. 1923 (1968); *Walz v. Tax Commission,* 397 U.S. 664,

90 S. Ct. 1409 (1970), or *Tilton v. Richardson, supra,* which all involved indirect (but often substantial) monetary benefits. (Of course, *Hunt v. McNair, supra,* was decided the same day as *Nyquist.*) And neither did the case destroy prior law dealing with indirect sectarian benefits of other than a monetary nature, such as *McCollum v. Board of Education,* 333 U.S. 203, 68 S. Ct. 461 (1948); *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679 (1952); or *McGowan v. Maryland,* 366 U.S. 420, 31 S. Ct. 1101 (1961).

Yet the Minnesota Supreme Court has interpreted *Nyquist* as holding that a statute will be declared void if *any effect* is to further sectarian purposes, and hence, for all practical purposes, these prior cases are to be disregarded. This inevitable conclusion was recognized in the concurring opinion of Justice Yetka of the Minnesota Supreme Court:

> If this recent trend of decisions by the United States Supreme Court continues to its logical conclusion, the decision of Walz v. Tax Commission, 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed. 2d 697 (1970), appears in jeopardy.
>
> —— Minn. ——, 224 N.W. 2d at 354, A. 129-130.

Justice Yetka could have added the cases cited above due to the consistency of their results.

By its interpretation of *Nyquist,* the Minnesota Supreme Court also placed in confusion any meaningful interpretation of the other 1971 decisions, namely, *Lemon v. Kurtzman, supra,* and *Earley v. DiCenso,* 403 U.S. 602, 91 S. Ct. 2105 (1971). These cases invalidated Pennsylvania and Rhode Island statutes, respectively, which gave various types of direct subsidies to sectarian schools. The statutes were *not* voided on the secular purpose or "primary effects" aspects of the test, however, but on the entanglement issue. If the Minnesota Supreme Court is correct, the entanglement issue is

moot because statutes of that type must necessarily be voided under an "any effects" test. Again, Petitioners do not read *Nyquist* so severely; the entanglement issue should still be relevant because the controlling test from this Court is the "primary effects" test.

2. The Free Exercise Clause.

As a necessary corollary to its reading of the Establishment Clause, the Minnesota Supreme Court upset the delicate balance this Court has been attempting to establish between the religion clauses of the First Amendment.

> The majority opinion in Nyquist disregarding the balancing approach of Walz and related cases has *chartered a new course, giving clear preference to the Establishment Clause over the Freedom of Exercise Clause of the First Amendment.*
>
> —— Minn. at ——, 224 N.W. 2d at 353, A. 127. (Emphasis supplied.)

Such language is in stark contrast to repeated expressions of neutrality by Chief Justice Burger in *Walz v. Tax Commission, supra:*

> The Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.
>
> 397 U.S. at 668-669, 90 S. Ct. at 1411.
>
> * * *
>
> Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.
>
> 397 U.S. at 669-670; 90 S. Ct. at 1402.

Such a conclusion by the Minnesota Court also has grave overtones regarding established precedent such as *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925), and more recent law such as *Wisconsin v. Yodor*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

Thus the entire parameters of the two religion clauses are here brought in to play.

3. Had the Minnesota Supreme Court Correctly Interpreted Nyquist and Its Companion Cases, the Lower Court Would Have Been Affirmed.

Petitioners' position at the time of trial was that this statute was in accord with the then latest expressions in this area, *Lemon v. Kurtzman, supra,* and *Tilton v. Richardson, supra.* The June, 1973 decisions did nothing to change that position. Instead, the emphasis simply shifted to sustaining the statute both under prior law and *Nyquist* and companion cases, which Petitioners assert they did in brief and oral argument before the Minnesota Supreme Court. In order to convince this Court to grant the Writ, however, some brief comments on why this statute was valid under *Nyquist* appear to be in order.

a. *Nyquist* and companion cases came before this Court on procedural motions without the benefit of documented trial records. This posture allowed this Court to *assume* the religious nature of the nonpublic school, hence giving immediate credence to the "permeation" theory. Thus in *Nyquist, supra,* the Court stated:

> No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes *nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions* . . . .
>
> 413 U.S. at 774; 93 S. Ct. at 2966. (Emphasis supplied.)

This is more clearly explained in *Hunt v. McNair, supra,* decided the same day:

> Aid normally may be thought to have a primary effect of advancing religion *when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.*
>
> 413 U.S. at 743; 93 S. Ct. at 2874. (Emphasis supplied.)

Here the eight-day trial, the 100-odd exhibits and the findings and conclusions of the trial court resulting therefrom, do *not* support these generalizations. Plaintiffs were forced to prove the validity of the permeation theory and hence overcome the statistical guarantees of neutrality in the statute. Plaintiffs failed in their burden of proof; the evidence failed to establish any permeation of the sectarian into the secular in the schools examined. This resulted in the negative findings referenced before.

b. The statute is so constructed that the amount of tax credit can *never* exceed 80 percent of the actual expenses per pupil in the nonpublic school. Thus even if the tuition paid by the parent or the dollar limitation are greatly in excess of the actual expense limitation, the 80 percent limitation will control; the amount of the credit is always the *lesser* of the three computations. The 80 percent-20 percent formula embodies the legislative conclusion that at least 80 percent of actual maintenance costs in nonpublic schools relate to secular activities. (Findings of Fact 41 and 42, A. 77) And the credit can never exceed this amount.

In *Nyquist,* the three statutes had obvious defects that did not separate secular from sectarian. The maintenance and repair grants contained only a dollar limitation. The parental

grants were *unrestricted* grants of $50 and $100 limited only to not exceed one-half of actual tuition. The "tax modification" or deduction act was based on a sliding scale that depended solely on the amount of taxable income. Thus in all three acts there was no real attempt to separate secular and sectarian activities in the nonpublic schools, proportion the costs accordingly and then provide parental assistance based upon the costs of the secular education shouldered by those parents. Thus the acts were voided because of both the statistical and actual possibility that some of the public funds would be used to support sectarian activities.

Under the Minnesota law, however, the statute was carefully drafted to separate costs relating to secular and sectarian activities, and the trial *on the merits* demonstrated that such a result was statistically and practicably achievable.

c. The distinction between *Nyquist* and this case goes further, however. The grants in *Nyquist* were totally unrelated to the educational counterpart, namely the *public* school system. Here the gross maintenance costs of the nonpublic school are determined according to the exact same standards as the public schools. After that gross figure is reduced by 20 percent to arrive at the "restricted maintenance cost" per pupil unit, the result is multiplied by the average state foundation aid percentage in the *public* school system. In other words, the credit is not only restricted to the maximum secular costs of education, but the credit is proportional to the assistance that the state renders to the parents of public school students in the form of state foundation aids.[3]

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[3] For example, if the maintenance cost per pupil unit in a nonpublic school was $400, restricted maintenance cost is $320, and if the ratio of state aids was 35 percent, the credit would be $112 per pupil.

This concept is significant for two reasons:

(1) it recognizes that the nonpublic school parent is providing a secular education for his child in all respects comparable to the free education provided in the public schools; and

(2) it maintains a cost ratio between the two school systems so that the nonpublic school costs do not "run away" from the public school costs.[4]

This aspect of the formula further guarantees that the parental assistance is related only to the secular aspects of education provided by them.

There are other distinctions between *Nyquist* and this case, but Petitioners assert enough has been said to demonstrate that if the Minnesota Supreme Court had not misinterpreted *Nyquist*, an affirmance would have resulted.

B. GREAT UNCERTAINTY IS PRESENT IN POST-NYQUIST DECISIONS SO THAT THIS COURT'S POWER OF SUPERVISION SHOULD BE EXERCISED.

Even though *Nyquist* and companion cases were just decided in June, 1973, the case law demonstrates great uncertainty both as to the applicable standard in church-state cases, and the application of the standard to concrete facts. The following cases demonstrate this assertion.

In *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W. 2d 577 (1974), the Wisconsin Supreme Court upheld direct grants of public funds to public and nonpublic schools in order to educate handicapped children. Despite the fact that

[4] In fact, the reverse seems to be true. The trial disclosed that the maintenance costs per pupil unit in the nonpublic school system were substantially *lower* than in the public school system. (Finding of Fact 66, A. 80)

the schools involved were elementary and secondary, the Court made only footnote references to *Nyquist*, justifying its decision on *Hunt v. McNair, supra*, and *Tilton v. Richardson, supra*. The Court stated the test in terms of the "primary effect" of the statute, rather than "any effect." On a set of *stipulated facts*, the Court then separated the secular from the sectarian nature of the instruction to be provided:

> While the educators and staff involved in such laudable endeavor as the providing of special educational services may generally be of a singular religious denomination such is insufficient to characterize their conscious or subconscious attitudes as necessarily religiously directed. We do not question the religious background of our legislators, executive officers or members of our judiciary in furtherance of their respective duties and neither may bad faith be presumed on the part of professionals involved in special educational services.
>
> 64 Wis. 2d at 325, 219 N.W. 2d at 583.

In *Allen v. Morton*, 495 F. 2d 65 (1973), the Circuit Court for the District of Columbia decided that the Christmas Pageant for Peace held on federal land adjacent to the White House was constitutionally permissible if the regulations were amended to avoid excessive entanglement of federal officials. In discussing the "primary effect" test, the Court states:

> . . . the degree of religiosity permeating the activity with which it is involved can have a direct bearing on what controls it must establish.
>
> * * *
>
> . . . we are involved in a balancing test, considering variables such as the degree of sectarianism in the institution or event with which the government is involved, the extent of the government's involvement, and the controls placed thereon.
>
> 495 F. 2d at 72.

In a footnote to the last cited sentence, the Court then delves into a semantic jungle in attempting to apply its elusive standard:

> The Pageant, as previously discussed, is not subsumed in a religious mission, but it cannot be ignored that the religious symbol contained in the Pageant can have a religious effect, and the degree of this effect can vary according to how it is utilized. In turn, the effect of the Government's involvement therewith can vary according to the restrictions and controls placed thereon. A balancing of all of these factors determines if the effect of the Government's involvement is more than remotely or incidentally beneficial to religious institutions.
>
> The creche as used in the Pageant is not supposed to have a sectarian effect in the sense of advancing any religious belief. The reality of the situation—considering its status as a Christian religious symbol—leaves open for debate whether its use is susceptible to misinterpretation, and the Government's involvement looked upon as an imprimatur of the belief that it symbolizes.
>
> Ibid.

Probably the best expression of the uncertainty generated by *Nyquist* is found in the concurring opinion of Justice Yetka of the Minnesota Supreme Court in this case.

> Although the majority decision of this court is mandated by the recent opinions of the United states Supreme Court which apparently forbid any direct aid to nonpublic schools, I am compelled to state that there appears to be a sharp departure from past precedent.
>
> It is difficult to perceive the distinction between striking down a tax credit allowed for sending a child to a nonpublic school when that school must follow a state

prescribed curriculum and where no part of the tax credit may be used for the teaching of religion oriented subjects, and yet, on the other hand, upholding the constitutionality of granting tax-exempt status to churches, and further, to allow an individual a tax deduction for contributions to his church. This case points out once again that while a strong philosophical argument could be made against all tax exemptions or deductions, this is a province that is better left to legislative determination, not to the courts.

I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. There is a distinction between actively supporting a religion or religions, and offering private education the chance to exist and to be available to all parents—poor or middle class, as well as the wealthy—who choose to exercise the right to send their children to nonpublic schools.

The strict scrutiny that legislations, such as that struck down today, must undergo appears far beyond the degree of protection necessary to insure that our nation will be free from a "state religion" or religious persecution of its citizens. Rather, our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court in our land has spoken, and this court and our legislature must adhere to its word.

—— Minn. at ——, 224 N.W. 2d at 354, 355; A. 129-130.

CONCLUSION

This case offers an excellent factual vehicle for this Court to correct the uncertainty generated by *Nyquist*, the error of the Minnesota Supreme Court in its position that the "primary effects" test is replaced by an "any effects" test, and the error that the Establishment Clause overshadows the Free Exercise Clause of the First Amendment.

Respectfully submitted,

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